

**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

HP/230/2017

THE PEOPLE

V

**DENNIS NGOMA
CRISPINE SHANKONDE
AARON MUMBA
RAYMOND MWANZA
CHARLES NTAMBWE**



**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 20th DAY OF
OCTOBER, 2017**

For the State : Ms E. Mulele, Senior State Advocate, NPA

For the Accused persons : Ms H Musonda, Legal Aid Counsel, Legal Aid Board

J U D G M E N T

CASES REFERRED TO:

1. *Elias Kunda V The People* 1980 ZR 100
2. *Ivor Ndakala V The People* 1980 ZR 180
3. *George Nswana V The People* 1988-1989 ZR 174
4. *Martin Mupeta and John Chanda V The People* SCZ/137/2012

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*

The five accused persons stand charged with one count of aggravated robbery contrary to Section 294 (1) of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Dennis Ngoma, Crispine Shankonde, Aaron Mumba, Raymond Mwanza and Charles Ntambwe on 6th February, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together and whilst armed with iron bars and machetes did steal a motor vehicle namely Toyota Alex registration number ALH 3290 valued at K23, 000.00 the property of David Kabwe, and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said David Kabwe in order to obtain or retain or prevent or overcome resistance from its being stolen or retained.

All the accused persons denied the charge, and the matter proceeded for trial. The State called three witnesses, while all the accused persons gave their defence on oath, and called no witnesses. The onus is upon the State to prove the case beyond all reasonable doubt.

PW1 was David Kabwe. He testified that on 5th February, 2017 he had knocked off late from work around 23:00 hours, and had driven to his home in Chelston, where he had parked the vehicle outside near the bedroom window. That thereafter he had locked up and went to sleep.

He stated that around 02:00 hours he heard some noise outside, and when he peeped out of the window he had observed that the vehicle had moved from where he had parked it, although it was showering. That when he went to the other window he saw a group of about six people, and he opened the window and shouted with the hope that his neighbours would go to his help. He testified that when he shouted three of the men advanced towards him and told him that if he continued shouting they would break the house.

It was PW1's testimony that he then closed the window and tried to call a police officer of Chelston police, but he did not respond to the call. In fear of going to the police as it was still dark, PW1 stated that he waited until 06:00 hours and then went and reported to Chelston Police. From there he went back home with some police officers who advised him to go back to the police station around 10:00 hours to go and give a statement.

That he did so, and thereafter started waiting until 17th February, 2017 when a police officer of Central Police Mr Simuchembu phoned him and asked him to go and identify his vehicle from among those that had been recovered. PW1 told the court that he went and identified the vehicle by virtue of the dent that it had at one of the rear doors after he had hit into a tree, and it had been panel beaten. That the vehicle had the registration number engraved on the side mirrors of the vehicle, and he was able to identify it on that basis.

He went on to testify that he was unable to identify the persons who stole his vehicle as it was raining and also because he was scared, although there is an ordinary bulb outside the house.

PW1 identified the white book for the vehicle and it was marked 'ID1', and he also identified his Toyota Alex vehicle and it was marked 'ID2'.

In cross examination, PW1 testified that only the number plates of the vehicle were removed after the vehicle was stolen. He agreed that he was scared during the robbery, and that he had very little time to observe his attackers, although there was light where the vehicle was parked. He also testified that the neighbours did not hear him shout as it was showering, and that the house left of his has a high wall, and is about ten metres from his. That the house to the right of his is about fifteen

metres away. PW1 also agreed that no identification parade was conducted, and his evidence was that he had never seen the accused persons prior to the day that he testified.

Ackson Phiri a police officer was PW2. It was his testimony that on 27th February, 2017 he had reported for work at Lusaka Division Anti-Theft of Motor Vehicle when he was assigned to do a physical inspection of a motor vehicle that had been recovered by the Anti-Robbery Squad. He stated that he inspected the Toyota Alex which was silver in colour, and he noted that it had no number plate. It's chasis number was NZ121-5031067 and the engine number was 1NZ-A453016, and he submitted his findings to Detective Inspector Simuchembu of the Flying Squad.

That he was later told that the vehicle belonged to Mr Kabwe. He was not cross examined.

The last State witness was Detective Inspector Joseph Simuchembu. PW3 told the court that on 6th February, 2017 he reported on duty around 06:00 hours when he was tasked to follow up a case of aggravated robbery made at Chelston Police by David Kabwe of Palmwood Drive. That he had found David Kabwe at Chelston Police, and he proceeded with him back to the Division where he interviewed him. PW3 stated that David Kabwe explained that he had parked the vehicle outside the house when he had knocked off from work around 23:00 hours, and went to sleep. That around 01:00 hours he heard some noise outside, and when he opened the window he saw not less than five people pushing his vehicle towards the main gate. He went on to explain that David Kabwe had told him that when the men noticed that he had opened the window they had advanced towards him with iron bars and

machetes, and he had closed the window in fear of his life, and reported the matter later to Chelston police.

PW3 told the court that he instituted investigations into the matter and on 13th February, 2017 between 15:00 and 16:00 hours he received information that the stolen vehicle had been seen between Kanyama and John Laing compounds, and the informant led him to one of the suspects' house. PW3 testified that on 14th February, 2017, he went to the said house in the company of other officers where they picked up a suspect whom they came to know as Crispin Shankonde, and recovered the vehicle whose ignition had been tampered with, and took the vehicle and the suspect to the police station.

At the police station Crispin Shankonde was interviewed and he stated that he was with Dennis, Charles, Raymond and Aaron, and that he could lead police to them. It was PW3's evidence that the other four men were rounded up the same day and he interviewed them, and came to know them as Dennis Ngoma, Raymond Mwanza, Charles Ntambwe and Aaron Mumba. Upon being interviewed they did not give a satisfactory answer and PW3 made up his mind to charge and arrest them for the subject offence. Under warn and caution in English language which they understood better, they gave free and voluntary replies denying the charge.

He stated that an inspection of the vehicle was done and the details on the vehicle corresponded with the details on the white book that David Kombe had submitted to him. The white book and vehicle were produced and marked 'P1' and 'P2'. He stated that A2 was found in possession with the vehicle.

In cross examination, PW3 stated that he only interviewed the complainant in connection with the offence as no one else came forward with information over the said robbery. He denied that the informant made up the information as the vehicle was recovered. It was his evidence that the accused persons houses were not searched, and that A2 had phoned his co-accused persons, and they were apprehended. He however denied that Joshua Banda's name popped up during in the investigations, and that A2 told him that Joshua Banda had given him the vehicle to sell. He agreed that there was no information connecting the rest of the accused persons to the offence, apart from A2 who was found in possession of the vehicle.

A2 was DW1. It was his evidence in defence that on 12th February 2017, Joshua Banda his neighbour had approached with a vehicle being a Toyota Alex by make and told him that he was selling it at K25, 000.00. Joshua Banda had asked A2 to help him sell it. He stated that he got the vehicle and that when he asked Joshua for the papers for the vehicle, Joshua told him that he had forgotten them at home.

A2 also testified that the next day on 13th February, 2017 he had phoned Joshua and had asked him for the papers for the vehicle so that he could look for customers, and he was told that upon finding a buyer, he should call Joshua, to go and collect the papers. That on 14th February, 2017, he had gone to Makeni Simoson to show the vehicle to an interested buyer and the person had liked the vehicle. He told the court that he then decided to go back to John Laing to collect the documents for the vehicle from Joshua, and as he reached John Laing he was intercepted by police who told him that they were looking for the vehicle.

A2 testified that he had explained to the police that the vehicle belonged to Joshua, and he asked to take them there but the police declined, stating that he had already been apprehended. That while he was in the vehicle, Charles Ntambwe had phoned him saying that there was a buyer whom he wanted to show the vehicle, as he had informed him about the vehicle on 12th February, 2017. He stated that police told him that they were looking for Charles Ntambwe, and asked A2 to tell him to meet at Geoget, and that Charles had gone there with a friend and they were apprehended.

When cross examined, A2 testified that he was apprehended as he left Makeni going to John Laing at the Sable road turnoff on Los Angeles Boulevard. He denied having been apprehended at his house. He maintained that he told police about Joshua and Gift, and not that he stole the vehicle. That he could call Joshua and Gift as his witnesses as they cannot be found. A2 also denied having led police to the arrest of his co accused persons, and he denied knowing A1, A3 and A4, stating that he knows A5 as they are friends, and are both Tonga by tribe. His evidence with regards to his whereabouts on 6th February, 2017, when the vehicle was stolen, was that he was at home with his wife Grace Songiso and his children, and that he told police so. He agreed that he was found in possession of the stolen vehicle.

A5 was DW2. It was his defence that on 12th February, 2017 around 19:00 hours that he had received a phone call from A2 who told him that he had been given a vehicle to sell, and that he should help him find buyers for the same. That thereafter on 14th February, 2017, he was at Vodaphone with Raymond Mwanza (A4), and he had told Raymond about the vehicle, and Raymond had asked to see the said vehicle so that he

could help find buyers for it. A5 told the court that he then phoned A2 with a view that he could see the vehicle, and they agreed to meet at Geoget. At Geoget they waited for A2 at a Zoonna stand, and they were approached by police officers who apprehended them and put them in vehicles.

A5 testified they found A2 in one of the police vehicles and was beaten and swollen, and they proceeded to the police station. That however before they reached there, A1 had called him and asked him where he was, and the police had asked him not to reveal. It was his testimony that A1 had asked for the saw which he needed to use to cut some planks.

Further in his defence, A2 testified that police concluded that A1 was also involved and they asked him where A1 was found, and he led them to the shop where he operated from at Mobil, and he was also apprehended. He denied any knowledge of the vehicle, stating that on 6th February, 2017, he was at home.

In cross examination, A5 stated that on 6th February, 2017, he was at home with his wife Precious Chinjila, and that he had explained so to the police. He agreed that he did not cross examine PW3 on this. He further agreed that A2 led police to him.

A1 was DW3. In his testimony he stated that on 14th February, 2017, he had phoned A5 and had asked him to take the saw to him, as he needed it for works that he was doing. That he waited for A5 for about two hours and he did show up, and when he called him back A5 had told him he was going there.

Further in his defence, A1 stated that as he was at the shop he saw plain clothes police officers alight from a vehicle with A5 who was badly beaten, and they asked A5 if A1 was the person, and that is how he was apprehended, and charged with the offence. A1 told the court that he came to know A2 whilst in police custody, and he denied any knowledge about the vehicle.

A1 when cross examined testified that on 6th February, 2017 he was at home with his children. He also stated that he was not given a chance to explain anything by the police. He maintained that he only knew A2 when he was in police custody, and that he does not know A3 and A4, as he also knew them in cells.

The fourth defence witness was A4. Like A5 he testified that on 14th February, 2017, he was at a bar called Vodaphone with A5, when A5 told him that someone was selling a vehicle. That they had left to go and see the vehicle after A5 had called the person who was selling the said vehicle. He explained that they went to Geoget and he was drunk, and they were apprehended by police officers. That whilst at the police station his phone had rang, and the police had told him to answer it. A4 testified that when he answered the phone A3 was on the line, and he had told him that he was in custody at Chongwe Police, and thereafter police went to Chongwe police and returned with A3.

When cross examined, A4 denied that A2 led police to his apprehension. He also told the court that he last spoke with A3 on 24th December, 2016 and 30th January, 2017, and that he recalled those dates as he was sober then. It was his evidence that A3 had phoned him, and told him that he had been apprehended over a plot. A4 stated that he does not know A1 and A2.

The last defence witness was A3. His testimony was that on 12th February, 2017, he was apprehended at Chalimbana junction, and taken to Chongwe police over a plot that he had sold. As he could not get through to people at home and at the farm when he tried to call them, he had called A4 and informed to tell his relatives of the arrest. That he had again phoned A4 on 15th February, 2017 and had asked him to inform his relatives of his arrest, and on the same day around 15:00 hours, police officers went and got him from Chongwe police and took him to Central police where he found A4, and he was charged with the offence.

A3 when cross examined stated that prior to his arrest he had last spoken with A4 on 24th April, 2016. He agreed that he had heard A4 testify that they had last spoken on 24th December, 2016 and 30th January, 2017. That when he called A4 on 15th February, 2017, A4 did not tell him that he had been apprehended for aggravated robbery. A3 also testified that he only knows A4 among his fellow accused persons. His evidence with regard to his whereabouts on 6th February, 2017 was that he was at home.

I have considered the evidence. It is not in dispute that PW1 reported to Chelston police that his motor vehicle Toyota Allex registration number ALH 3290 was stolen at his home by a group of more than five men who had threatened him with machetes and iron bars, on 6th February, 2017.

It is also not in dispute that PW1 could not identify any of his attackers, and that on 12th February, 2017 the vehicle was found in the possession of A2. The question is whether it has been proved beyond all reasonable doubt that the five accused persons committed the offence of aggravated robbery?

Aggravated robbery is defined in Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia as;

“(1) Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years”.

The evidence given by PW1 was that he saw more than five people pushing his vehicle towards the gate, and when he open the window three of them had advanced towards him with machetes and iron bars and had threatened to harm him if he shouted, and he had closed the window in fear. The vehicle was taken away, and as there was a threat of violence used when taking the car by more than two people, which was not disputed, the offence of aggravated robbery was complete.

With regard to whether it was the accused persons who committed the offence, PW1 testified that it was at night and showering and he was scared so he was unable to see the attackers. Therefore there is no direct evidence pointing to the accused persons as having stolen the vehicle. However A2 was found in possession of the vehicle barely a week after it was stolen, and the question is whether the doctrine of recent possession

can be invoked? In the case of **ELIAS KUNDA V THE PEOPLE 1980 ZR 100** it was held that;

“(ii) In cases where guilt is found by inference, as for instance, where the doctrine of recent possession is applied, there cannot be conviction if an explanation given by the accused, either at an earlier stage (such as to the Police) or during the trial, might reasonably be true.

(iii) Where an accused person is in possession of property recently stolen, the court may infer guilty knowledge if he gives no explanation to account for his possession or if the court is satisfied that the explanation offered is untrue.”

Further in the case of **GEORGE NSWANA V THE PEOPLE 1988-1989 ZR 174** where the Supreme Court stated that *“the inference of guilt based on recent possession particularly where no explanation is offered which might reasonable be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime, and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer”*.

Further that the case of **MARTIN MUPETA AND JOHN CHANDA V THE PEOPLE SCZ/137/2012** held that *“the period within which the presumption can operate varies according to the nature of the*

article stolen. Three months would be sufficiently recent for a motor vehicle. But for such articles as pass from hand to hand readily like a cell phone, one month would be a long time, but seven days would be sufficiently recent”.

A2 was found in possession of the stolen vehicle about eight days after it was stolen, and going by the periods stated in the **MARTIN MUPETA AND JOHN CHANDA V THE PEOPLE SCZ/137/2012** case he was therefore in recent possession of the stolen vehicle, and the question is whether in innocent possession of the vehicle or a thief or was a guilty receiver or retainer of the vehicle?

As already seen, there is no direct evidence pointing to the identity of the people who stole the vehicle from PW1. A2 who was found in possession of the vehicle, and in his defence he testified that his neighbour Joshua Banda gave him the vehicle to sell. The question is, is this explanation reasonably true?

PW3 who apprehended A2 with the vehicle testified that A2 did not tell him about Joshua Banda being the person who was selling the vehicle. He did however give this explanation in court. He denied that he was apprehended at his home in John Laing compound as testified by PW3, stating that he was intercepted as he was leaving Makeni for John Laing to go and collect the papers for the vehicle from Joshua, as he had found someone who was interested in buying the vehicle.

When PW3 testified he was not challenged on his evidence that A2 was apprehended at his house with the vehicle. Therefore the truth or otherwise of this statement was not tested, and being unshaken it is credible evidence. The assertion by A2 in his defence that he was not

apprehended at the house with his vehicle is just an afterthought, and I find that PW3's evidence as to how A2 was apprehended with the vehicle is what had happened.

A2 testified that he was Joshua Banda's neighbour, and having been apprehended at his house with the vehicle he could lead police to Joshua who was just within the neighbourhood. He did not do so and it is my finding that the explanation that A2 gave of how he was in possession of the vehicle could not be reasonably true. He was therefore not in innocent possession of the vehicle, and the only reasonable inference that can be drawn is that he was among the people who robbed PW1 of the vehicle, and threatened him with violence. The offence of aggravated robbery has been proved against A2, and I find him **GUILTY** as charged and I **CONVICT** him accordingly.

With regard to the rest of the accused persons the only evidence linking them to the offence is that given by A2 to the police. In the case of **IVOR NDAKALA V THE PEOPLE 1980 ZR 180** it was held that;

“When an accused makes an extra-judicial statement in the absence of a co-accused, it cannot be regarded as evidence against the latter accused; but when the accused goes into the witness box at the trial and gives evidence which incriminates his co-accused, that evidence is admissible against the latter accused, and it may be regarded as evidence for the prosecution against him”.

In this case A2 did not give incriminating evidence against his co-accused persons when he testified, and as can be seen from the above authority the alleged extra-judicial statement that he gave to the police which

resulted in the co accused persons being apprehended cannot be regarded evidence against them. The evidence on record does not connect the co accused persons to the offence, and there is therefore insufficient evidence against them and I find A1, A3, A4, and A5 **NOT GUILTY** and I **ACQUIT** them forthwith.

DATED THE 20th DAY OF OCTOBER, 2017

Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**

REPUBLIC OF ZAMBIA
IN THE HIGH COURT FOR ZAMBIA

HOLDEN AT LUSAKA
(Criminal Jurisdiction)



HP/230/2017

THE PEOPLE

VERSUS

CRISPINE SHANKONDE

WARRANT FOR EXECUTION OF SENTENCE
(Section 307, Criminal Procedure Code, Cap 88)

TO: The Superintendent of the Prison at LUSAKA CENTRAL

WHEREAS at a Session Holden before me on the 2nd of October, 2017 **Crispine Shankonde** was convicted by this Court of the offence of **Aggravated Robbery** contrary to Section 294(1) of the Penal Code Cap 87 of the Laws of Zambia and was sentenced to **fifteen (15) years imprisonment with hard labour** with effect from 14th February, 2017 the date of arrest.

You are therefore required to lodge the said **Crispine Shankonde** in the **Central Prison at Lusaka** together with this warrant in order for the execution according to law of the aforesaid sentence for which this shall be a sufficient warrant to all whom it may concern.

Given under my hand this 20th October, 2017.

.....
S. Kaunda Nawa
HIGH COURT JUDGE

REPUBLIC OF ZAMBIA
NOTIFICATION OF ACQUITTAL
IN THE HIGH COURT FOR ZAMBIA



AT.....LUSAKA.....HP/230/2017

THE PEOPLE

V

DENNIS NGOMA

TO: THE SUPERINTENDENT OF THE PRISON AT **LUSAKA CENTRAL PRISON**

WHEREAS on the 2nd day of October, 2017, **Dennis Ngoma** Stood charged before this Court of the offence of **Aggravated Robbery** contrary to Section 294(1) of the Penal Code Cap 87 of the Laws of Zambia.

I HEREBY NOTIFY YOU that he has been found not guilty of the said charge and has been acquitted.

Dated at Lusaka this 20th day of October, 2017.

Castro Kachingwe
Clerk of Sessions

REPUBLIC OF ZAMBIA
NOTIFICATION OF ACQUITTAL
IN THE HIGH COURT FOR ZAMBIA



AT.....LUSAKA.....HP/230/2017

THE PEOPLE

V

AARON MUMBA

TO: THE SUPERINTENDENT OF THE PRISON AT **LUSAKA CENTRAL PRISON**

WHEREAS on the 2nd day of October, 2017, **Aaron Mumba** Stood charged before this Court of the offence of **Aggravated Robbery** contrary to Section 294(1) of the Penal Code Cap 87 of the Laws of Zambia.

I HEREBY NOTIFY YOU that he has been found not guilty of the said charge and has been acquitted.

Dated at Lusaka this 20th day of October, 2017.

Castro Kachingwe
Clerk of Sessions

REPUBLIC OF ZAMBIA
NOTIFICATION OF ACQUITTAL
IN THE HIGH COURT FOR ZAMBIA



AT.....LUSAKA.....HP/230/2017

THE PEOPLE

V

RAYMOND MWANZA

TO: THE SUPERINTENDENT OF THE PRISON AT **LUSAKA CENTRAL PRISON**

WHEREAS on the 2nd day of October, 2017, **Raymond Mwanza** Stood charged before this Court of the offence of **Aggravated Robbery** contrary to Section 294(1) of the Penal Code Cap 87 of the Laws of Zambia.

I HEREBY NOTIFY YOU that he has been found not guilty of the said charge and has been acquitted.

Dated at Lusaka this 20th day of October, 2017.

A handwritten signature in black ink, appearing to read 'Castro Kachingwe', written over a horizontal line.

Castro Kachingwe
Clerk of Sessions